No. 80-358

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

FRANK SANTORA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. In deciding whether there was reasonable suspicion to "stop"" the petitioner in the Houston, Texas airport, may the overriding factor be that petitioner looks and dresses in a manner consistent with the image of an Italian-American from the New York area?

2. Can agents of the Federal Bureau of Investigation after "stopping" petitioner in the Houston, Texas airport, pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), and never articulating any fear that petitioner was armed and dangerous, nevertheless justify a protective frisk by apparently claiming that petitioner is of Italian ancestry.[1]

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1. This issue was briefed for the Court of Appeals. The Government, in its brief however, failed to address itself to this issue. Moreover, the Court of Appeals in its opinion also failed to discuss this issue. In a petition for rehearing based solely on this issue, the Court of Appeals denied the petition without opinion.

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FRANK SANTORA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The opinion of the District Court for the Southern District of Texas is not reported and, also appears in the Appendix hereto.

JURISDICTION

The petitioner Frank Santora respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals, for the Fifth Circuit entered in this proceeding on June 23, 1980. A petition for rehearing was denied on August 4, 1980.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution:

"AMENDMENT IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE

On March 7, 1979, Frank Santora, Marcello Stellato and Joseph Varrone were indicted in the United States District Court for the Southern District of Texas on charges of conspiracy to transport stolen securities in interstate commerce, and one substantive count of transporting stolen securities in interstate commerce, in violation of Section 2314 of Title 18.

Prior to the trial, Santora filed a pre-trial motion to suppress all of the evidence obtained after an investigatory stop of him in the Houston Airport on February 10, 1979. After a two day hearing, his motion was denied in a memorandum opinion.

On May 29, 1979, Santora and Varrone went to trial before Judge Finis E. Cowan; on May 25, 1979, defendant Stellato had entered a plea of guilty. The trial lasted four days; Santora was found guilty of both counts contained in the indictment and

Varrone was acquitted of both counts. On June 27, 1979, defendant Stellato was sentenced to a term of five years' probation, and on July 9, 1979, Santora was sentenced by Judge George Cire to three years imprisonment on each count, the sentences to run consecutively.

The facts giving rise to the "stop and frisk" are undisputed; they were adduced at a suppression hearing.

On February 8 and 9 of 1979, the Government's informant recorded several conversations with Marcello Stellato (16-30).[2] These conversations concerned Stellato's desire to sell negotiable securities to the informant at the Houston Airport on February 10th. The securities were stolen on July 13, 1978, from Bradford Security, in New York City (37). In addition, on February 9th, the informant also recorded a conversation from an individual identified as Frank; this conversation, in essence, was to confirm a prior conversation between Stellato and the informant regarding the amount of money to be paid for the securities (30-33). Moreover, during this taped conversation, Frank stated that he would be in Houston on February 10th (31).

At 11:50 A.M. on February 10th, the informant received another telephone call from Stellato; this time, however, Stellato was calling from the Houston Airport (34); the informant made arrangements to meet Stellato at 1:30 P.M. in the Dobbs Coffee Shop at the airport (34); Stellato told the informant that he was wearing a blue jacket, blue pants, blue shirt, and was carrying a tan overnight bag (35-36). Furthermore, he also stated that he was by himself (36).

After the telephone call, John F. McAuliffe, William J. Canalez, and other agents of the Federal Bureau of Investigation "were briefed about the transaction that was to take place at the airport" (70, 138); they also knew that a person named

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2. Refers to page number of the original suppression hearing.

"Frankie" was a possible "subject" in the investigation (138). The agents, however, did not know Frank's last name or his ethnic background (97). Their assignment at the airport was to "identify any possible accomplices or other individuals that might be present and to interview them concerning their presence at the airport" (139).

Upon his arrival at the airport, Agent Canalez initially saw Marcello Stellato in front of the Dobbs Coffee Shop; Stellato was wearing a blue suit and shirt (70). As Canalez walked towards the coffee shop, he noticed Frank Santora walk by the coffee shop, stop at the PAN AM ticket counter, turn, and walk past the coffee shop to the cocktail lounge (72); as Santora walked by the coffee shop, he looked inside (72). In the cocktail lounge, which was occupied by other people, Santora and Varrone shared a table (73, 100). At this time, McAuliffe also was attracted to Santora and Varrone (140, 144). From 1:15 P.M. to 2:15 P.M., Santora twice walked by the coffee shop; in addition, while seated in the lounge, he looked in the general direction of the coffee shop (175). Most of the time, however, he and Varrone remained seated at their table (80). Upon learning that Stellato had been arrested, McAuliffe and Canalez proceeded to the cocktail lounge, showed Santora and Varrone their credentials, and asked them to identify themselves (148, 183).

Each of the agents discussed several factors as to why they initally began to observe Santora, and then later stop him:

> Canalez:
>
> "There were no other real factors besides the clothes he was wearing, the fact that he was walking by the coffee shop slowly and looking in the coffee shop, the hairstyle, the fact that he appeared to be, what I would consider to be, of Italian ancestory" (96).

McAuliffe:

"Q. . . .and you thought that somebody was going to be along for the proposed seller of these stolen securities. That's the one factor and this person had walked by, in a one-hour period, past the coffee shop two times glancing in, and the person had sat at a table and glanced toward the coffee shop; is that correct? Those three things, right? A. The person was with another individual that was walking around separately from him.

"Q. Okay. You want to add that as a fourth factor that the other person with him walked by the coffee shop one time? A. At least once that I can recall independently or separately.

"Q. Okay. And that is it; correct: A. I mean—yea, basically, that's correct." (177)

McGauley:

"I would have to say also that I was looking for an individual from New York. I would have to say that Mr. Santora fit the part of maybe an Italian or of Italian descent and I certainly found a key fit to what I felt like I was looking for.

Then when he made the observation and the surveillance of the Dobbs Coffee House, I felt he certainly deserved to be one" (255).

After Santora produced his driver's license, he was questioned by McAuliffe concerning his reasons for being in Houston (149-150). Following his responses to the questions posed, Santora was asked by McAuliffe to empty his pockets (81, 152). Agent McElrath then patted him down (185). At this

point. McGauley arrived at the coktail lounge and told the agents that they should continue questioning Santora and Varrone in a more private area on the next level (152, 243). As they reached the lower level of the airport, Santora had to use the bathroom; McAuliffe accompanied him (153). While they were in the bathroom, McGauley examined the items that were removed from Santora's pockets; he uncovered a piece of paper with the initials and telephone number of the Government's informant, and saw Stellato's telephone number in Santora's telephone book (246, 247); Santora had previously denied knowing Stellato (246). Thereafter, the informant, who was allowed to overhear Santora's voice, made an identification (248). Santora was then formally placed under arrest (249).

Following the suppression hearing, the District Court denied petitioner's motion to suppress; the District Court finding that the actions of the agents were supported by probable cause. The judgment of the District Court was affirmed by the Court of Appeals for the Fifth Circuit. That Court found that the actions of the agents amounted to a "stop" and were supported by reasonable suspicion. In part, the Court of Appeals stated:

> "The first two items listed involve the similarity of appearance of Santora and Varrone to that of Stellato, who was known to be involved in criminal activity. The agents also knew how Stellato would be dressed and were aware that his name was an Italian name. It was not unreasonable for the agent to suspect that Stellato's companions might be of similar ancestry. Therefore, it was reasonable for the agents to focus on two men similarly dressed in a manner consistent with the image of an Italian-American from the New York area. The Texas trial judge may well have concluded that men so dressed would be as conspicuous in the Houston Airport as two Texans, similarly dressed in a manner consistent with the image of a Texan would be in an eastern airport."

The Court of Appeals, however, failed to address itself to the propriety of the protective frisk. On reargument concerning this specific issue, the Court of Appeals denied the petition without an opinion.

REASONS FOR GRANTING THE WRIT

I.

The questions presented concerning whether a person's ancestry may be a significant factor to be taken into account in determining the reasonableness of a "Stop and Frisk" in a public airport are important questions of federal law which have not been, but should be settled by this Court.

In *Terry v. Ohio*, 392 U.S. 1 27, 30 (1968), this Court held that "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the [person] with whom he is dealing may be armed and presently dangerous," the officer may stop and frisk that person for weapons without probable cause to arrest the person for a crime.

Moreover, this Court also "approved such a search on facts that did not constitute probable cause to believe the suspects guilty of a crime, requiring only that 'the police officer. . .be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant' a belief that his safety or that of others is in danger." *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975). *See also, Brown v. Texas*, 443 U.S. 47, 51 (1979); *Dunaway v. New York*, 442 U.S. 200, 208-210 (1978).

Thereafter, in *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), this Court applied *Terry* in the special context of roving border patrols stopping automobiles to check for illegal immigrants, *Dunaway v. New York, supra* at 210. In *Brignoni-Ponce, supra*, at 885-887, this Court concluded that the apparent

Mexican ancestry of the occupants of the car could not be the sole reason to justify stopping the car. This Court further stated at pp. 885-887:

> "In this case the officers relied on a single factor to justify stopping respondent's car: the apparent Mexican ancestry of the occupants. We cannot conclude that this furnished reasonable grounds to believe that the three occupants were aliens. At best the officers had only a fleeting glimpse of the persons in the moving car, illuminated by headlights. Even if they saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country. Large numbers of native-born and naturalized citizens have the physical characteristics identified with Mexican ancestry, and even in the border area a relatively small proportion of them are aliens. The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens."

Here both the Fifth Circuit Court of Appeals and the District Court primarily justified the "stop" by relying upon the apparent Italian ancestry of the petitioner.[3]

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3. The Court of Appeals stated:

> "The first two items listed involve the similarity of appearance of Santora and Varrone to that of Stellato, who was known to be involved in criminal activity. The agents also knew how Stellato would be dressed and were aware that his name was an Italian name. It was not unreasonable

(Cont'd)

The flaw in this reasoning is that the agents at the suppression hearing gave no reasons why they believed petitioner was of Italian ancestry; clearly, there are no physical characteristics distinct to persons of Italian origin. Neither, the Fifth Court of Appeals, the District Court, or the Government could point to any physical characteristics or mode of dress which distinguishes persons of Italian ancestry from others of European descent. Accordingly, if this factor is withdrawn from consideration, there is no reasonable grounds to believe that peititoner was involved in any criminal activity.

In addition, this Court in *Terry*, established:

(Cont'd)

> for the agent to suspect that Stellato's companions might be of similar ancestry. Therefore, it was reasonable for the agents to focus on two men similarly dressed in a manner consistent with the image of an Italian-American from the New York area. The Texas trial judge may well have concluded that men so dressed would be as conspicuous in the Houston Airport as two Texans, similary dressed in a manner consistent with the image of a Texas would be in an eastern airport."

The District Court stated:

> "In addition, the FBI agents knew that Marcello Stellato was a person having a name commonly associated with those of Italian-American parentage. They inferred the possibility that Stellato would be accompanied by other persons of Italian-American descent. While it is difficult to verbalize with complete precision all of the ethnic, racial and social traits involved, it is readily apparent that both Messrs. Santora and Varrone are very likely persons of Italian-American descent. Their appearance is consistent with the popular image of an Italian-American from the New York/New Jersey area, at least one of the FBI agents involved in connection with the surveillance had worked in the New York area and he felt that he could identify Italian-Americans from the New York/New Jersey area with some degree of certainty."

> "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." *Id.*, at 27. *See Adams v. Williams*, 407 U.S. 143 (1972); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

In the opinion dated June 23, 1980, the Court of Appeals failed to address itself to an important issue previously raised in defendant-appellant's main brief (p. 17), to wit: Whether the search of Santora's pocket was a reasonable protective search within the meaning of *Terry v. Ohio*, 392 U.S. 1 (1968). On August 4, 1980, the Court of Appeals denied a petition for rehearing on this issue. In its opinion the Court of Appeals determined that the following sequence of events occurred:

> "After Stellato left the coffee shop meeting and was arrested in a different part of the terminal, the FBI agents approached Santora and Varrone, revealed that they were FBI agents, and asked for defendants' identification. Santora produced his New York driver's license which confirmed the fact that he was from the New York City area and that his first name was Frank. The defendants also complied with the agents' request that they empty their pockets and accompany the agents to a more private place on the lower level. At the lower level, Agent McGauley examined the contents of the pockets in more detail and discovered documents describing the stolen municipal bonds, a piece of paper bearing the confidential informant's initials and telephone number and a telephone book containing Stellato's telephone number. (Santora had earlier denied that he knew Stellato)."

Based upon these facts there was no good reason for the agents to apprehend that they were in a position of real danger. Here, petitioner did not try to evade the agents, the agents were several in number, had surrounded the petitioner, were in a public facility, had not recovered any weapon from Stellato, and never articulated any fear that Santora or his companion were armed and dangerous. To approve the extensive search made here would stretch the concept of protective search far beyond *Terry, supra,* and *Adams v. Williams, supra.*

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

BARRY M. FALLICK
Attorney for Petitioner

September 3, 1980

APPENDIX

OPINION OF THE COURT OF APPEALS DATED JUNE 23, 1980

UNITED STATES of America,

Plaintiff-Appellee,

v.

Frank SANTORA,

Defendant-Appellant.

No. 79-5382

United States Court of Appeals, Fifth Circuit

June 23, 1980

Defendant was convicted in the United States District Court for the Southern District of Texas, Finis E. Cowan and George E. Cire, JJ., on one count of conspiracy to transport stolen securities in interstate commerce and one count of transporting stolen securities. Defendant appealed, and the Court of Appeals, Daniel Holcombe Thomas, District Judge, held that: (1) the specific articulable facts known to the law enforcement agents who initially stopped defendant were sufficient to support a reasonable suspicion that defendant was involved with criminal activity; (2) evidence obtained as a result of the investigatory stop was admissible; and (3) the Government's direct examination of its own witness was not improper and prejudicial.

Affirmed.

Opinion

1. Arrest 63.5(4)

An investigatory stop is lawful if it is based on a reasonable suspicion, stemming from specific articulable facts, that the person stopped is involved in criminal activity.

2. Arrest 63.5(5)

Investigatory stop of defendant was based on specific articulable facts that were sufficient to support a reasonable suspicion that defendant was involved in criminal activity and, therefore, stop was lawful where defendant and his companion were present in vicinity of airport coffee shop in Texas in which a third party, who was known to be involved in crminal activity and who had an Italian name, was meeting with a confidential informant and where defendant and his companion appeared to be Italian-Americans from New York and defendant and his companion showed interest in the meeting which they evidenced by strolling past and looking into the coffee shop and where the agents reasonably suspected that the third party would have companions of Italian ancestry.

3. Criminal Law 706(3)

In prosecution for conspiring to transport stolen security in interstate commerce and transporting stolen securities, the Government's direct examination of its own witness, an attorney, was not an improper attempt to link defendant to organized crime where the challenged question, the purpose of which was to establish the witness' firsthand knowledge of a prior conviction of defendant's codefendant, merely asked the attorney to give his former employment and where, in responding to question, the attorney made reference to the organized crime section of the Federal Bureau of Investigation and the trial judge instructed the jury to disregard the reference. 18 U.S.C.A. §§371;2314.

4. Criminal Law 394.1(2)

Where facts known to Federal Bureau of Investigation agents were sufficient for lawful investigatory stop of defendant, inculpatory evidence obtained during the investigatory stop was admissible.

Appeal from the United States District Court for the Southern District of Texas.

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

Frank Santora appeals his convictions under 18 U.S.C. §371 on one count of conspiracy to transport stolen securities in interstate commerce and under 18 U.S.C. §2314 on one count of transporting stolen securities. Appellant contends that the trial court erred in denying his motion to suppress inculpatory evidence obtained during an investigatory stop. For reasons discussed below, we conclude that the evidence was properly admitted at trial; therefore, we affirm.

On February 8 and 9, 1979, the Federal Bureau of Investigation's confidential informant recorded several telephone conversations with one Marcello Stellato from the New York or Brooklyn area. The conversations concerned Stellato's proposal to sell negotiable securities in the form of municipal bonds which had been stolen on July 13, 1978, from Bradford Security in New York City to the informant at the Houston Intercontinental Airport on February 10, 1979. During this time the informant had also recorded a conversation which he had

* District Judge of the Southern District of Alabama, sitting by designation.

with another individual, also from the New York or Brooklyn area, who identified himself as "Frank" or "Frankie." In the course of this conversation "Frank" confirmed the amount of money to be paid for the securities and stated that he would be in Houston on February 10.

On the morning of February 10, 1979, Stellato telephoned the informant from the Houston Airport and arranged to meet him later that afternoon in the airport's Dobbs House coffee shop. Stellato described the clothing he would be wearing as a blue jacket, blue pants, and blue shirt. He also revealed that he would be carrying a tan overnight bag and would be alone.

Armed with all the above information, several F.B.I. agents, including McAuliffe, Canalez and McGualey, went to the Houston Airport on the afternoon of February 10 to investigate the suspected conspiracy involving the stolen bonds. From the description Stellato gave of himself, Agent Canalez was able to recognize him standing in front of the Dobbs House coffee shop. As Canalez approached the coffee shop he noticed a man,[1] later

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1. At the suppression hearing the F.B.I. agents articulated the factors which attracted their attention to Santora:

> Canalez:
>
> There were no other real factors besides the clothes he was wearing, the fact that he was walking by the coffee shop slowly and looking in the coffee shop, the hairstyle, the fact that he appeared to be, what I would consider to be, of Italian ancestory [sic].
>
> Record, Vol. 1, at 96.
>
> McAuliffe:
>
> Q [A]nd you thought that somebody was going to be along for the proposed seller of these stolen securities. That's the

(Cont'd)

identified as Frank Santora, walk past the coffee shop two times before he went into the cocktail lounge across from the coffee shop to share a table with a man later identified as codefendant Varrone.

While Stellato and the confidential informant, accompanied by a female agent, were seated in the coffee shop discussing the

(Cont'd)

> one factor and this person had walked by, in a one-hour period, past the coffee shop two times glancing in, and the person had sat at a table and glanced toward the coffee shop; is that correct? Those three things, right?
>
> A. The person was with another individaul that was walking around separately from him.
>
> Q. Okay. You want to add that as a fourth factor that the other person with him walked by the coffee shop one time?
>
> A. At least once that I can recall independently or separately.
>
> Q. Okay. And that is it; correct:
>
> A. I mean — yes, basically, that's correct.
>
> Record, Vol. 1, at 177.
>
> McGauley:
>
> I would have to say also that I was looking for an individual from New York. I would have to say that Mr. Santora fit the part of maybe an Italian or of Italian descent and I certainly found a key fit to what I felt like I was looking for.
>
> Then when he made the observation and the surveillance of the Dobbs Coffee House, I felt he certainly deserved to be one.
>
> Record, Vol. 2, at 255.

sale of the stolen bonds. Santora and Varrone sat at a table in the cocktail lounge where they were noticed by Agent McAuliffe. The entrance to the coffee shop and part of its interior could be observed from the defendant's table. Several times during the coffee shop meeting Santora and Varrone walked by the coffee shop and looked in and also looked toward the coffee shop while seated in the lounge.

After Stellato left the coffee shop meeting and was arrested in a different part of the terminal, the F.B.I. agents approached Santora and Varrone, revealed that they were F.B.I. agents, and asked for defendants' identification. Santora produced his New York driver's license which confirmed the fact that he was from the New York City area and that his first name was Frank. The defendants also complied with the agents' request that they empty their pockets and accompany the agents to a more private place on the lower level. At the lower level, Agent McGauley examined the contents of the pockets in more detail and discovered documents describing the stolen municipal bonds, a piece of paper bearing the confidential informant's initials and telephone number and a telephone book containing Stellato's telephone number. (Santora had earlier denied that he knew Stellato.) After an agent who had listened to the "Frank" tape and the confidential informant had identified Santora's voice as that of "Frank" and the pocket contents had been examined, Santora and Varrone were formally placed under arrest and given the *Miranda* warnings.

Prior to his trial Santora filed a motion to suppress all of the evidence obtained from him during the investigatory stop in the Houston Airport. After a hearing, this motion to suppress was denied by the district judge.[2]

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2. The suppression hearing resulted in the following findings of fact.

1. The FBI agent's action in their initial interview of Santora and Varrone in asking Santora and Varrone to identify themselves in the

(Cont'd)

Opinion

On May 29, 1979, Santora and Varrone went to trial, the result of which was that Santora was found guilty of both counts contained in the indictment, while Varrone was acquitted of both counts. Stellato had earlier entered a plea of guilty. On July 9, 1979, Santora was sentenced to three years imprisonment on each count with the sentences to run consecutively.

Defendant Santora appeals, contending that the investigatory stop was illegal and that the evidence obtained during the stop was tainted by that initial illegality and,

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(Cont'd)

bar was reasonable, supported by probable cause, and not an illegal search, seizure or arrest.

2. Neither Santora nor Varrone was physically restrained in the bar. There is no evidence and no basis for a conclusion, as to what would have occurred had Santora and Varrone attempted to leave rather than engaging in conversation with the officers.

3. The action of the FBI agents in requesting Santora and Varrone to go with them from the bar area to the baggage area of the airport terminal was a reasonable action, was not an unreasonable search and seizure, and did not constitute an arrest.

4. There is no evidence and no basis for a conclusion as to what would have occurred had Santora and Varrone, during the trip to the baggage area, simply walked away and refused to cooperate further with the FBI agents.

5. After examining the contents of Santora's and Varrone's pockets, and identifying Frank Santora's voice as the "Frank" on the tape, there was clearly probable cause for an arrest, and arrest thereafter was entirely proper.

6. Santora and Varrone have not been the victims of an unlawful arrest, or an illegal search and seizure.

Memorandum Opinion and Findings of Fact Concerning Motion to Suppress Documentary Material Taken from the Persons of Frank Santora, Jr., and Joseph Anthony Varrone. Record Excerpts at 17.

therefore, should have been suppressed under the "fruit of the poisonous tree" doctrine. *Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978).

[1] There is no doubt that the confrontation of Santora and Varrone by the F.B.I. agents constituted a "stop" as contemplated by *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). The controlling issue in this case, then, is whether the initial stop was a lawful investigatory stop. A *Terry* stop if an individual is lawful if it is based on a reasonable suspicion that the person is involved with criminal activity. *Id.* Furthermore, that reasonable suspicion of criminal activity must stem from specific articulable facts. *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975).

[2] Both the government and the appellant articulate five specific facts which we find sufficient for reasonable suspicion that Santora was involved with criminal activity and, thus, justify the initial stop. These are stated as follows:

(1) the same color of clothing as Stellato

(2) his Italian appearance and hairstyle

(3) a belief that Stellato would be accompanied by other individuals

(4) Santora twice within one hour walking past the coffee shop and looking inside and

(5) looking toward the coffee shop while seated in the lounge.

Brief for Appellee at 6 and Brief for Appellant at 12.

The first two items listed involve the similarity of appearance of Santora and Varrone to that of Stellato, who was known to be involved in criminal activity. The agents also knew how Stellato would be dressed and were aware that his name was an Italian name. It was not unreasonable for the agent to suspect that Stellato's companions might be of similar ancestry. Therefore, it was reasonable for the agents to focus on two men similarly dressed in a manner consistent with the image of an Italian-American from the New York area.[3] The Texas trial judge may well have concluded that men so dressed would be as conspicuous in the Houston Airport as two Texans, similarly dressed in a manner consistent with the image of a Texan would be in an eastern airport.

The third articulated fact was based on the taped telephone conversation which the confidential informant received from "Frank" who stated that he would be coming to Houston at the same time as Stellato. Appellant argues that Stellato's statement that he would be alone at the coffee shop meeting should eliminate this fact from the agents' consideration. We do not agree. It was reasonable for the agents to suspect that "Frank" would be present at the airport though not present at the coffee shop meeting. The obvious interest of Santora and Varrone in the coffee shop meeting, evidenced by their strolling past, looking in, and watching from the lounge, also gave the agents cause to be reasonably suspicious.

Appellant argues that these five articulated facts are insufficient to create a reasonable suspicion that Santora was engaged in crminal activity and relies on the cases of *United States v. Ballard*, 573 F. 2d 913 (5th Cir. 1978), and *United States v. Beck*, 602 F. 2d 726 (5th Cir. 1979), cases which held

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3. At least one of the F.B.I. agents involved in the airport surveillance had worked in the New York area and felt that he could identify Italian-Americans from the New York area with some degree of certainity. Brief for Appellee at 4.

no reasonable suspicion to justify the investigatory stops. These two cases can be distinguished from the instant case on the facts.

In *Ballard*, the agents received an anonymous tip from a drug unit that a black man, five feet eight inches tall, weighing 140 pounds, and having a thin face and torso would be arriving at the New Orleans Airport on a flight from Los Angeles. The agents stopped a black man, six feet tall and weighing 170 pounds, because he was carrying limited luggage, seemed nervous, and was walking rapidly through the airport. The stop was held to violate the fourth amendment because of insufficient factors for reasonable suspicion of criminal activity. 573 F. 2d at 916.

In *Beck*, the illegal stop occurred when police officers in a patrol car passing through a predominantly black, high-crime neighborhood noticed an automobile containing two black males parked on the side of the road with its engine running about one block from a convenience store. One of the officers testified that he knew almost everyone who lived in the community and that he failed to recognize either of the two black men in the car. The initial stop occurred when the officers pulled their patrol car alongside the parked car, blocking the vehicle, and began to question the occupants. The court held the stop clearly illegal because there is nothing inherently suspicious about two black men sitting in a parked car, with or without the engine running, on a street in a black neighborhood on a midsummer afternoon. 602 F. 2d at 729.

[3] Appellant raises a second issue in his brief, contending that the government's direct examination of its own witness was improper and prejudicial because it was an attempt to link the defendant to organized crime. We find this contention to be without merit. The direct examination in question was that of a prosecution witness, an attorney who was asked to give his former employment. The question was a preliminary one, the

purpose of which was to establish the witness' first hand knowledge of a prior conviction of co-defendant Varrone, not of Santora. In responding to the question the witness referred to the Organized Crime Section of the F.B.I. and the trial judge instructed the jury to disregard the reference. Record, Vol. 2, p. 428. No prejudice to Santora has been demonstrated.

[4]Having held that the facts known to the F.B.I. agents were sufficient for a lawful investigatory stop and that the subsequently obtained evidence was not tainted by the illegality of the stop, we must affirm the trial judge's decision to admit the evidence.

AFFIRMED.

MEMORANDUM OPINION AND FINDINGS OF FACT CONCERNING MOTION TO SUPPRESS DOCUMENTARY MATERIAL

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CRIMINAL NO. H-79-40

FILED MAY 21, 1979

UNITED STATES OF AMERICA

v.

FRANK SANTORA, JR., et al

MEMORANDUM OPINION AND FINDINGS OF FACT CONCERNING MOTION TO SUPPRESS DOCUMENTARY MATERIAL TAKEN FROM THE PERSONS OF FRANK SANTORA, JR., AND JOSEPH ANTHONY VARRONE

On the 14th and 16th days of May, 1979, the court conducted an extensive hearing, hearing testimony from multiple witnesses, concerning the circumstances existing at the time of and immediately before the arrest of Frank Santora, Jr. and Joseph Anthony Varrone. The purpose of this hearing was to enable the court to make a factual determination on the question of whether or not there was probable cause for the arrest of Santora and Varrone at the time they were arrested.

On February 10, 1979, the agents of the Federal Bureau of Investigation knew that one Marcello Stellato had carried on telephone conversations with agents of the FBI arranging for the delivery of a large quantity of negotiable securities to a

confidential informant of the FBI at the Houston Intercontinental Airport on February 10. These telephone conversations also enabled the investigating agents of the FBI to know that a person named "Frank" also from the New York or Brooklyn area was possibly involved in the plan and enterprise to deliver negotiable securities.

On the afternoon of February 10, while the confidential informat was meeting with Stellato in the Houston Intercontinental Airport coffee shop, a number of other agents of the FBI made efforts in the airport to ascertain whether or not Stellato had been accompanied by other persons engaged in the alleged conspiracy to deliver stolen municipal bonds to the confidential source.

While Stellato and the confidential source were seated in the coffee shop discussing exchange of the stolen bonds, Santora and Varrone initially positioned themselves at a table of a bar located immediately adjacent to the coffee shop. From the table in the bar the entrance to and a portion of the coffee shop could be observed. Several times during the period when Stellato and the confidential source were in the coffee shop, Santora and Varrone would walk by the coffee shop, gazing intently inside the coffee shop, and exhibiting considerably interest in the events taking place therein.

In addition, the FBI agents knew that Marcello Stellato was a person having a name commonly associated with those of Italian-American parentage. They inferred the possibility that Stellato would be accompanied by other persons of Italian-American descent. While it is difficult to verbalize with complete precision all of the ethnic, racial and social traits involved, it is readily apparent that both Messrs. Santora and Varrone are very likely persons of Italian-American descent. Their appearance is consistent with the popular image of an Italian-American from the New York/New Jersey area. At least one of

the FBI agents involved in connection with the surveillance had worked in the New York area and felt that he could identify Italian-Americans from the New York/New Jersey area with some degree of certainty.

After Stellato had exited the coffee shop, passed to a different part of the terminal and had been arrested, the FBI agents in charge made a determination to ask Santora and Varrone to identify themselves. The FBI agents then did in fact ask Santora and Varrone to identify themselves. At this time, the FBI agents did not tell Santora or Varrone that they were under arrest. The FBI agents did not impliedly or directly threaten Santora and Varrone or communicate to Santora and Varrone that they were unable to leave. The FBI agents did tell Santora and Varrone that they were FBI agents, that they wished to talk to Santora and Varrone, and they requested Santora and Varrone to empty their pockets, which Santora and Varrone did.

When Santora produced his driver's license, it became apparent to the FBI agents that Mr. Santora's first name was "Frank" and that he was from the New York area.

It has not been established that the interview of Santora and Varrone at the table at the bar was a "custodial interrogation." Neither Santora nor Varrone attempted to leave. Neither Santora nor Varrone have testified that they felt constrained, or unable to move, although they could have testified at the suppression hearing without their testimony becoming admissible at the later trial of the case.

The FBI agents have testified, and the court accepts their credibility, that they do not know with certainty what would have occurred had Santora and Varrone attempted to leave without identifying themselves because that eventuality never materialized.

The FBI agents requested Santora and Varrone to follow them out of the bar area and go down to the lower level in the airport terminal, where the baggage claiming area is located. There is no evidence that Santora and Varrone were physically restrained when they and the FBI agents walked from the coffee shop to the lower level of the airport.

When Santora and Varrone reached the lower level, the material which they had produced from their pockets was examined in more detail and it was discovered that either Santora or Varrone had a list of the stolen municipal bonds which Stellato was transporting. In addition, one of them had a piece of paper containing the telephone number of the FBI's confidential source, who had previously been talking to "Frank" and Marcello Stellato in recorded telephone conversations concerning the delivery of the stolen bonds. In addition, an FBI agent who had monitored the telephone conversations between "Frank" and the FBI's confidential source identified Frank Santora's voice as being the voice of "Frank" on the tapes in which the delivery of the bonds had been discussed.

After "Frank's" voice had been identified and the contents of the pockets of Mr. Santora and Mr. Varrone had been examined, Santora and Varrone were formally placed under arrest.

With reference to this series of events, the court makes the following findings of fact and conclusions of law, to wit:

1. The FBI agents' action in their initial interview of Santora and Varrone in asking Santora and Varrone to identify themselves in the bar was reasonable, supported by probable cause, and not an illegal search, seizure or arrest.

2. Neither Santora nor Varrone was physically restrained in the bar. There is no evidence and no

basis for a conclusion, as to what would have occurred had Santora and Varrone attempted to leave rather than engaging in conversation with the officers.

3. The action of the FBI agents in requesting Santora and Varrone to go with them from the bar area to the baggage area of the airport terminal was a reasonable action, was not an unreasonable search and seizure, and did not constitute an arrest.

4. There is no evidence and no basis for a conclusion, as to what would have occurred had Santora and Varrone, during the trip to the baggage area, simply walked away and refused to cooperate further with the FBI agents.

5. After examining the contents of Santora's and Varrone's pockets, and identifying Frank Santora's voice as the "Frank" on the tape, there was clearly probable cause for an arrest, and arrest thereafter was entirely proper.

6. Santora and Varrone have not been the victims of an unlawful arrest, or an illegal search or seizure.

ENTERED and EXECUTED at Houston, Texas, this the 21st day of May, 1979.

s/ F.E.C.
United States District Judge

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED JUNE 23, 1980

No. 79-5382

D.C. Docket No. CR-H-79-40

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK SANTORA,

Defendant-Appellant.

Appeal from the United District Court for the Southern District of Texas

Before: VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the conviction of the said District Court in this cause be, and the same is hereby, affirmed.

June 23, 1980

ISSUED AS MANDATE:

* District Judge of the Southern District of Alabama, sitting by designation.

PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED AUGUST 4, 1980

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUT

No. 79-5382

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FRANK SANTORA,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

(August 4, 1980)

Before VANCE and SAM D. JOHNSON, Circuit Judges, and THOMAS,* District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

s/ Robert S. Vance
United States Circuit Judge